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Litigating indigenous peoples' cultural rights: Comparative analysis of Kenya and Uganda

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ABSTRACT

Across Africa, indigenous peoples have increasingly approached courts for legal redress for violations of their rights. Many indigenous peoples have turned to litigation to reclaim their rights over their ancestral territories and protection of their cultural identity and heritage. Significantly, these claims have been legally articulated as cultural rights since land rights are connected with their right to culture, spirituality and cultural survival. In examining the situation in Kenya and Uganda, this article analyses how the framing of these claims under the banner of indigenous peoples' rights to culture could provide some of the most marginalised communities with new legal avenues to challenge the dominant cultural and developmental agenda imposed by states' authorities. In doing so, the article explores how litigation and the use of international norms can contribute to new interpretations of constitutional norms, allowing for a more encompassing interpretation of cultural rights which includes a customary cultural system of land usage. The article argues that the recognised right to cultural integrity for indigenous peoples could offer a relevant legal approach not only in Kenya and Uganda but also for the whole continent.

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In recent decades, many indigenous communities across Africa have approached courts for legal redress for violations of their rights, partly because of the absence of other avenues and the failure of alternative approaches (Couillard, Gilbert & Tchalenko 2017). This has included litigation at both national and regional levels. At the regional level, the cases brought by the Endorois community and the Ogiek communities against the government of Kenya have become emblematic of this struggle for indigenous peoples to get recognition of their cultural rights (see the 2010 *Endorois* and 2017 *African Court* cases below). At the national level, there have been many important litigation processes in Botswana, South Africa, Burundi and Tanzania from indigenous peoples claiming the recognition of their cultural rights (Barume 2010). Ongoing litigation is also taking place in Namibia, the Democratic Republic of Congo (DRC), and Uganda (Gilbert 2017). Commonly, all these cases concern claims by indigenous peoples to reclaim their rights over their ancestral territories. Significantly, these claims have been legally articulated under

the rubric of cultural rights since the connection to their land has been linked to their rights to culture, spirituality and cultural survival.

Commonly, these cases have relied quite heavily on international human rights law, notably due to the lack of proper legal recognition of cultural and land rights for indigenous peoples at the national levels (ILO & ACHPR 2009). Indeed, under international law, the connection between cultural rights and land rights for indigenous peoples forms a very important part of the international human rights legal framework (Gilbert 2016). The current international understanding of indigenous peoples is defined via a variety of characteristics: self-identification; historical continuity with precolonial societies; a strong link to territories; a distinct social, economic, or political system; a distinct dialect/language, culture, and beliefs; non-participation as a dominant group in national society; and resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples (Thornberry 2002). In terms of international law an important body of legal norms has been developed to protect indigenous peoples, including the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007, but also a very robust jurisprudence is emerging from international human rights monitoring bodies and regional human rights institutions. The protection of cultural rights constitutes an important aspect of such legal framework. The connection between cultural rights and indigenous peoples' rights is strongly embedded within international legal instruments as well as in the international jurisprudence. The cultural and spiritual connection between a territory and indigenous peoples is recognised as a very strong marker of indigenous peoples' identity, which has been put forward globally by indigenous representatives.

As this article examines, the legal connection between cultural rights and indigenous peoples' rights has some repercussion on continental jurisprudence and legal doctrine. Claims by communities using the legal rights of indigenous peoples have significantly increased across the continent, despite the controversies connected to use of the contemporary notion and definitions of 'indigenous peoples' (Hodgson 2011; Lynch 2012). This article wishes to analyse to what extent the framing of these claims under the banner of indigenous peoples' rights could support the recognition of cultural rights for some of the most marginalised indigenous communities. The aim is not to reflect on the way the term 'indigenous peoples' has been emerging in Africa, as a large body of literature exists on the issue (see for example Laher & Sing'Oei 2014; Ndahinda 2011) but rather to examine how the reference to indigenous peoples' rights as defined under international law has allowed some extremely marginalised communities to engage in legal action to get their cultural rights recognised. To undertake such an analysis, the article focuses on the situation in Kenya and Uganda, two countries which are witnessing important legal battles for the recognition of cultural rights for indigenous peoples.¹ In both countries, there is a lack of adequate national legal recognition of indigenous peoples, which is why communities have turned to international law. Our interest in Kenya and Uganda as case studies is sparked by the choice of these particular communities to articulate their claims under the banner of indigenous peoples' rights, and the challenge that such an approach presents to the legal frameworks of these two states concerning cultural rights. The article explores how the reference to both notions of 'indigenous peoples' and 'cultural rights' has been used to challenge the dominant political agenda of the two concerned states, which have usually ignored the recognition of cultural rights of marginalised

indigenous communities. Based on these two case studies, this article analyses to what extent litigation can contribute to a new interpretation of cultural rights that allows for a more encompassing approach to the meaning of cultural rights, notably based on indigenous peoples' spiritual and cultural attachment to land and natural resources. The article asserts the importance of recognising indigenous peoples' rights to cultural integrity, and its potential legal development across the continent. Overall, the article provides an overview on these processes of litigation in Kenya and Uganda, keeping in mind that law, litigation and legal processes are not the only and main road leading to the recognition of indigenous peoples' cultural rights.

Cultural rights, indigenous peoples and litigation in Kenya

Cultural rights are increasingly occupying an important human rights space in Kenya. In *Isaiah Waweru Ngumi & Others v Chairman National Land Commission & Others*,² for example, invocation of cultural rights delayed the expansion of the busy Nairobi-Nakuru Highway, which also links Kenya to Uganda, Rwanda, DRC, South Sudan, Sudan and Egypt. In the case, the petitioners successfully argued that the road expansion would lead to the needless demolition of Sigona House, a building which the petitioners argued is historical and part of their cultural heritage that should be preserved. The Webster's dictionary defines culture as:

the integrated pattern of human knowledge, belief, and behavior that depends upon the capacity for learning and transmitting knowledge to succeeding generations. The customary beliefs, social forms, and material traits of a racial, religious, or social group.³

Similarly, but more deeply, the Encyclopaedia Britannica defines culture as:

the integrated pattern of human knowledge, belief, and behavior ... language, ideas, beliefs, customs, taboos, codes, institutions, tools, techniques, works of art, rituals, ceremonies and other related components ...

In *Centre for Minority Rights Development (Kenya) & Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*,⁴ the African Commission on Human and Peoples' Rights (ACHPR) defined culture as:

that complex whole which includes a spiritual and physical association with one's ancestral land, knowledge, belief, art, law, morals, customs and any other capabilities and habits acquired by humankind as a member of society – the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups and in that it encompasses a group's religion, language, and other defining characteristics.⁵

The Constitution of Kenya 2010 (CoK) does not define culture. However, it recognises culture as the foundation of the nation and as the cumulative civilisation of the Kenyan people and nation (Article 11). It specifically obligates Kenya to promote all forms of national and cultural expressions through literature, arts, traditional celebrations, communications, information, mass media, publications, libraries and other cultural heritage (Article 11(2)). Further, the CoK obligates parliament to enact legislation to ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage (Article 11(3)(a)).

There are also numerous laws that address various aspects of culture in Kenya. For example, the National Museums and Heritage Act 2006 provides for the identification, protection, conservation and transmission of the cultural and natural heritage of Kenya. The recently adopted Protection of Traditional Knowledge and Cultural Expressions Act 2016 provides a framework for the protection and promotion of traditional knowledge and cultural expressions. The Act also gives effect to constitutional recognition of communal property rights and the protection and enhancement of intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of communities (Article 11 (3)(a)). Kenya also has a National Policy on Culture and Heritage 2009.⁶

The strong law and policy framework for the preservation and promotion of culture immensely benefits indigenous peoples as they usually have a strong attachment to their unique and rich cultures and traditions. However, the lack of secure land tenure presents a major challenge to the protection and transmission of indigenous cultures as they are closely linked to the lands, territories and natural resources in which they are practised. Consequently, the recognition of indigenous peoples and the protection of their traditional lands and resources is a critical component for the promotion and protection of their cultures, which the constitution mandates the state to do. Unfortunately, since independence in 1963, there has been no legal framework for the recognition for indigenous peoples' communal land rights in Kenya. Indigenous territories are viewed as *terra nullius* and are formally designated for other public interest purposes that include game and forest reserves. Indigenous peoples' lands are also alienated and distributed to private interests including foreign investors for agriculture, extractive industries and other infrastructure projects like wind and geothermal power projects. This has primarily contributed to the disintegration of indigenous cultures.

Since 1912, when the Maasai in *Ole Njogo & Others v The Attorney General & Others*⁷ went to court to challenge the British colonial government's acquisition of their land, indigenous communities have often had recourse to litigation to pursue the recognition and protection of their land and natural resource rights as both a direct and indirect means of protecting their cultures. Some of the indigenous communities that have litigated, albeit with mixed results, on cultural rights as part of their land rights struggles include the Endorois, Ogiek, and Maasai among others.

Who can litigate cultural rights?

Before delving into the discussion on indigenous peoples' litigation of cultural rights as part of their land rights' struggles, it is important first to briefly discuss the question of *locus standi* in litigating cultural rights. *Locus standi* is the right or capacity to bring an action or to appear in a court. It is a critical component of every litigation including those involving cultural rights. *Locus standi* requires a litigator of a cultural right violation to demonstrate the presence of an injury, either suffered or imminent, of a cultural right; that the injury is traceable to the challenged action of the defendant and that it must be likely, as opposed to merely speculative; and that a favourable court decision will redress the injury. The traditional concept of *locus standi* demands then that it should only be indigenous peoples whose cultures have been violated who can litigate against such violations. But in most cases, indigenous peoples lack the ability and/or means to litigate cultural rights as a result of various factors resulting from historical marginalisation. This

often might necessitate third parties to litigate cultural rights on behalf of indigenous peoples.

In recent years, courts all over the world have diverged from and evolved a number of exceptions to the traditional view of *locus standi*. In *Dr George Mampilly v State of Kerala*, for example, the High Court in Kerala observed:

Courts have now acknowledged that where there has been violation of constitutional or legal rights of persons who, by reason of their socially or economically disadvantaged position, are unable to approach the court for judicial redress, a member of the public could move the court for enforcement of such rights of such persons. This principle extends to cases where injury is caused only to public interest.⁸

More locally in Kenya, the CoK gives every person a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened (Articles 22(1) & 258(1) & (2)). In addition to a person acting in their own interest such a person may also institute court proceedings in the public interest (Articles 22(2)(c) & 258(2)(c)). The High Court in *Ngumi* delved into the issue of *locus standi* in litigating cultural rights. The court held that although the land in question did not belong to the petitioners, they had *locus standi* as their cultural interest in the building on the land goes beyond the core question of ownership and compensation because their claim is that the property has cultural values which they claim they have a right to enjoy as individuals and as a collective. Their cause of action therefore overlaps and exists independently of any proprietary claims held by anyone else.⁹

Emerging jurisprudence on *locus standi* therefore avails greater opportunities for litigating indigenous cultural rights attached to land by indigenous peoples themselves and other parties interested in protecting indigenous peoples' rights to their lands and cultures where indigenous peoples are unable to do so.

Recognition as indigenous peoples

Recognition and identification as 'indigenous peoples' can be a key factor in securing indigenous communities' cultures, especially as the constitution recognises culture as the foundation of the nation. Though there is no universal and unambiguous definition of the concept of 'indigenous peoples', some communities have litigated in both national and international institutions for their recognition as 'indigenous peoples'. The communities have argued that they should be recognised as such because they are culturally distinct and are preserving their cultures. In essence, the communities were challenging colonial and postcolonial government practices, which clustered some communities as part of neighbouring, larger communities rather than as distinct cultural groups. For example, the Ilchamus had been clustered as a clan of the Maasai, the Endorois as a clan of the Tugen, and Ogiek as a subgroup of the Kalenjin (see Lynch 2012; and Balaton-Chrimes 2013). The effect of such characterisation has been the non-recognition of such communities as distinct, separate groups, denying them access to governmental services and other opportunities that would be instrumental for the communities to advance their chosen way of life.

National courts have responded to indigenous peoples' recognition claims in various ways, with the majority decisions tending to recognise their claims for recognition as

'indigenous peoples'. In recognising the communities as such, the courts have based their decisions on international criteria and standards that speak to the rights of indigenous peoples. In *Rangal Lemeiguran & Others v Attorney General & Others*, for example, the High Court of Kenya relied on the characterisation of indigenous peoples by United Nations Special Rapporteur Francesco Capotorti and the recommendations by Jules Deschenes to the UN in 1985 to reinforce its opinion that the Ilchamus are culturally distinct, preserve their culture and 'proudly have all the attributes of the internationally recognized indigenous peoples'.¹⁰

Similarly, in *Joseph Letuya v Attorney General*,¹¹ the High Court of Kenya sitting in Nakuru relied on Article 1 of ILO Convention 169 on The Rights of Indigenous and Tribal Peoples (1989) to recognise the Ogiek as an 'indigenous community' in Kenya. The court opined:

From the ILO 169 definition, the distinguishing factor for indigenous communities is their historical ties to a particular territory, and their cultural or historical distinctiveness from other populations that are often politically dominant.¹²

The court concluded that the Ogiek, being both an indigenous community and a minority group, merit rights that apply to them as a special group, over and above the rights applicable to other persons. Constitutional provisions that recognise (Article 260) and provide affirmative actions (Articles 56, 63 & 100 for example) for indigenous communities in Kenya may have also informed the court.

However, despite the progressive approach to the recognition of indigenous communities in Kenya, some courts are still failing to fulfil their constitutional obligations to interpret the law in a manner that protects indigenous/marginalised communities as required by the national values and principles of governance in the CoK (Article 10). For example, in *Simion Swakey Ole Kaapei & Others v Commissioner of Lands & Others*,¹³ Maasai from Olosakwana in Narok County approached the High Court sitting in Nakuru to seek a declaration that their rights to property (Article 40), privacy and protection of their person (Article 31), as guaranteed by the CoK, had been violated. The community argued that as an indigenous community, the UNDRIP guaranteed their rights. The court analysed the UNDRIP, the World Bank safeguard policies on indigenous peoples, and the work of the African Commission Working Group on Indigenous Populations and the ACHPR decision in the *Endorois* case. But despite precedent and best practice in the interpretation of indigenous peoples' rights established in the *Lemeiguran* case and the above instruments/decisions, the court still denied the Maasai claims, concluding that all the 42 tribes¹⁴ of Kenya would qualify as 'indigenous peoples'. The court further disparaged pastoralist culture by encouraging policies and practices that protect them from the vagaries of nature by ensuring their ventures or way of life do not condemn them to a life entirely subjected to nature. Such an approach by the *Ole Kaapei* court flies in the face of constitutional recognition and protection of indigenous communities in Kenya and precedent established by other courts of similar jurisdictions.

Culture and representation

Interestingly, the court in the *Lemeiguran* case discussed above linked culture to representation, highlighting that the Ilchamus have the right to influence the formulation and implementation of public policy, and to be politically represented by people belonging

to the same social, cultural and economic context as themselves. Consequently, the court directed the then Electoral Commission of Kenya,¹⁵ at its next Boundary Review,¹⁶ to ensure adequate political representation of sparsely populated rural areas, population trends, and communities of interest, including the Ilchamus community. The court opined that the cornerstone of nationhood is the ability to achieve cohesiveness in diversity. The Ilchamus argued for representation on the basis that they were an indigenous and distinct community, with inadequate representation. The court opined that in a democracy like Kenya, political representation must of necessity be a major instrument for participation that should enable the voice of a minority group to be heard in official bodies. The court further opined that participation is the lifeline of democracy. The Ilchamus, by seeking adequate representation, cannot therefore pose a threat to any of the cherished values of a democracy. On the contrary, it adds value and gives true meaning to democratic ideals. The court supported its decision by quoting the UN Draft Declaration on the Rights of Indigenous Peoples. The decision is significant with regard to the protection of indigenous communities' cultures in Kenya and their right to representation in decisions affecting their cultures.

Recognition of land and resource rights

Indigenous cultures are closely linked to the lands and territories in which such cultures are practised. Hunter-gatherers, for example, require healthy, undisturbed ecosystems with plenty of flora and fauna to enable them to hunt wildlife and gather wild fruits and roots. Pastoralists, on the other hand, require large, open spaces with plenty of grass for their livestock. Any interference with their lands therefore threatens their traditional livelihood systems. In Kenya, indigenous communities' lands have been designated as forest reserves, national parks and game reserves or distributed to members of mainstream communities.¹⁷ Since the mid-1980s, indigenous communities like the Ogiek, Sengwer and Endorois have utilised both national and regional instruments for the recognition and protection of their land rights.

For example, in *Joseph Letuya & Others v Attorney General & Others*,¹⁸ the Ogiek, a former hunter-gatherer community found in the East Mau Forest near Nakuru in the Rift Valley, approached the High Court seeking a declaration that government settlement of other communities in their ancestral lands violated their right to life and livelihood and, by extension, their culture. In their submission, the Ogiek highlighted that in 2009, the government, through a Prime Minister's Taskforce, had even acknowledged that the Ogiek have a right to continue living in the Mau Forest in the area they have occupied for years as their ancestral land.¹⁹ The Ogiek presented a memorandum in which they argued that successive governments had criminalised their hunter-gatherer traditions. However, although the court found that the Ogiek depended on the Mau Forest to sustain their way of life as well as their cultural and ethnic identity, and that the Forest Act 2005 recognised the customary rights of forest dwellers in forests, it refused to grant the Ogiek any land rights in the forest. The court acknowledged that significant irregularities were committed during the allocations of Mau Forest from the 1990s to 2009, and such illegal allocations included allocations in respect of land occupied by the Ogiek. However, in the court's opinion, it could not recognise Ogiek land rights in the Mau Forest as:

the process of conferring legal and equitable property rights in land under Kenyan law is settled, and is dependent upon formal processes of allocation or transfer and consequent registration of title, or of certain transactions that confer beneficial interests in land in the absence of a legal title of ownership.²⁰

However, the court further noted that despite its finding on Ogiek property rights, the CoK provided for community land which shall be held by communities identified on the basis of ethnicity, culture or similar community of interest (Article 63). The court noted that the provisions of the constitution are to be given effect to, in and by an Act of parliament, which was yet to be enacted. It hoped that, once enacted, the law would eventually settle the issue of Ogiek property rights in the Mau and other forests in which they claim ancestral rights.

The Community Land Act was signed into law in September 2016. While it provides that community land shall be vested in communities (Section 3),²¹ the law is specific that all parts of community land that were used for a public purpose before commencement of the law automatically become public land vested in the national or county governments once the law is enacted (Section 13(2)). This provision might present a challenge to securing Ogiek ancestral land rights, as 22 blocks of the Mau Forest complex have been designated forest conservation areas managed by the Kenya Forest Service and several county governments, including those of Narok and Nakuru counties.

Litigating culture through a regional mechanism

Indigenous peoples in Kenya have also litigated cultural rights in African regional human rights mechanisms. For example, the Endorois and Ogiek communities in Kenya have successfully litigated on their cultural rights at the ACHPR and the African Court of Human and Peoples' Rights (African Court) respectively.

The Endorois, a traditional pastoralist community found in and around Lake Bogoria in Kenya's Rift Valley, had been evicted from their homes by the government of Kenya in the 1970s to make way for a national reserve in 1974. After numerous unsuccessful attempts to seek justice in national courts, the Endorois, represented by the Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group (MRG), approached the African Commission in May 2003 in the *Endorois* case. The Endorois alleged that the creation of the game reserve has resulted in the violation of their right to property, the right to free disposition of natural resources, the right to religion, the right to cultural life and the right to development as guaranteed by various articles under the African Charter on Human and Peoples' Rights (African Charter). The displacement specifically resulted in the denial of their right to practise their religion and culture as a result of systematic restrictions on access to religious and cultural sites on the banks of Lake Bogoria. The sites are of central significance for the Endorois' cultural rites and celebrations.

The community further argued that their attempts to access their ancestral land for religious and cultural purposes had been met with intimidation and arrests by government security forces, as they were now considered trespassers. The community further argued that their cultural rights had been violated by the serious damage caused to their pastoralist way of life. Mining concessions underway in the vicinity of Lake Bogoria would further threaten the community's cultural and spiritual integrity, they argued.²²

The violations allegedly contravened Article 17 of the African Charter which states 'every individual may freely take part in the cultural life of his community'.

Finding for the Endorois, the commission recommended that the government of Kenya recognises Endorois rights of ownership over Lake Bogoria and its environs and restitutes the lands to the Endorois. The commission also directed that the state should grant the Endorois unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites, and grazing for their livestock. The government was ordered to pay adequate compensation to the community for all the losses suffered²³ since the reserve was created; to pay royalties from existing economic activities including tourism and the exploitation of other resources from the lake; and also ensure that the Endorois benefit from employment possibilities within the reserve. Unfortunately, the government of Kenya has not implemented most of the commission's recommendations since the 2010 decision.

Learning from the Endorois community and with the support of CEMIRIDE and MRG, the Ogiek Peoples' Development Program (OPDP),²⁴ on behalf of the Ogiek community, filed a communication in 2009 before the African Commission against the government of Kenya. The communication concerned an eviction notice issued by the Kenya Forestry Service in October 2009, which required the Ogiek community and other settlers of the Mau Forest to leave the area within 30 days. The Ogiek argued that the threatened eviction and past evictions will and have violated their rights to life, property, natural resources, development, religion, culture and non-discrimination guaranteed by the African Charter.

In November 2009, the ACHPR issued an order for provisional measures requesting the government of Kenya to suspend its intended eviction of the Ogiek from Mau Forest. But following a lack of response from Kenya, the commission in July 2012 notified the African Court of the matter.²⁵ The African Court decided on the Ogiek case in May 2017, holding that the government of Kenya had violated numerous rights of the Ogiek as guaranteed by the African Charter. Specifically, the court held that the government of Kenya had violated Ogiek cultural rights by evicting them from their lands and territories. The government had therefore violated Articles 17(2) and (3) of the African Charter.²⁶ In doing so, the court rejected government arguments that it had not violated Ogiek cultural identity by evicting them because: 'the Ogiek no longer led traditional lifestyles and as a result of their new and more modern way of life the community had lost their distinctive cultural identity'.

The court held Kenya had not demonstrated that the Ogiek's lifestyle had changed to the extent that it might be said that they had eliminated their cultural distinctiveness. It held:

A static way of life is not a defining element of culture or cultural distinctiveness. ... It is natural that some aspects of indigenous population's culture, such as certain ways of dressing or group symbols, could change over time. Yet the values, mostly the invisible tradition of values embedded in the self-identification [of the group] often remain unchanged.²⁷

Furthermore, the court found that some of the changes to the Ogiek's lifestyle were a result of its treatment and denial of access to their land by the state.²⁸ Significantly for indigenous peoples' rights in Kenya and Africa generally, the African Court further held that indigenous cultures should not be disrupted in the public interest to conserve the environments in which the communities practise their cultures.²⁹

Challenges to litigating cultural rights

The above cases provide evidence of the numerous challenges faced by indigenous communities in litigating cultural rights. Besides regular threats, harassment and intimidation of community members and activists involved in such litigation,³⁰ some of the other challenges they face in litigating cultural rights include:

(a) A conservative judiciary reluctant to interpret constitutional provisions progressively and contribute to the development of law. This is especially worrisome since the majority of decisions from national courts were made after the adoption of the CoK, which strongly recognises and protects indigenous communities. The CoK clearly provides that 'in the exercise of judicial authority, the courts and tribunals shall be guided by, among others, the principle that justice shall be done to all irrespective of status' (Article 159(2)(a)). The judiciary *shall* also *protect* and *promote* the purpose and principles of the constitution (Article 159(2)(e)). Among the principles of the constitution is a set of national values and principles of governance that include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and *protection of the marginalised* (Article 10(1)(b)).

(b) Unwillingness by the executive arm of government to recognise indigenous peoples' rights or implement decisions that provide for indigenous peoples' rights. Despite constitutional recognition of community land rights and strong affirmative action aimed at addressing the situation of indigenous communities, the executive arm of government is still reluctant to advance indigenous peoples' rights. For example, the government deliberately delayed the enactment of a Community Land Act beyond the time provided by the constitution³¹ and has not implemented any aspects of the *Endorois* decision.

(c) The public interest that is driving the acquisition of indigenous peoples' territories for national development priorities like conservation, carbon, agriculture and other infrastructure projects also threatens indigenous land rights and by extension their cultures. Though the public interest projects may be considered legitimate national goals, as argued by government in the *Endorois* case, restricting celebrations of cultural festivals and rituals cannot be deemed proportionate to such aims and is not in line with principles of international law on human and peoples' rights.

Cultural rights, indigenous peoples and litigation in Uganda

The situation in Uganda is equally complex when it comes to claiming cultural rights for indigenous peoples. Not unlike the situation in Kenya, the term 'indigenous' is seen as controversial, and the protection of cultural rights is usually limited to the dominant ethnic groups, leaving little space for more marginalised communities. To analyse the situation in Uganda and allow a comparative analysis with the situation in Kenya, the following discussion focuses on the situation of the Batwa. The reason for focusing on the Batwa is two-fold: one relates to their status as one of the most marginalised and destitute communities in the country, and the other to their claim for the recognition of their cultural rights over their ancestral lands.

The Batwa: a history of discrimination and dispossession

The Batwa of Uganda are part of the larger family of so-called 'pygmies' of the Great Lakes region of Central Africa who are widely recognised as the original inhabitants of the

region, and have traditionally been predominantly forest-dwelling hunter-gatherers (Lewis 2000). Since colonisation, they have been gradually evicted from their lands following the creation of national parks in the forests covering their ancestral territories.³² While colonial protection of forests started in the 1930s, many Batwa continued to live in forests and to use their resources until the 1990s when they were evicted, without consultation, adequate compensation, or an offer of alternative land (Woodburn 1997). As a result, the Batwa have seen the heart of their culture, traditions, beliefs and wealth swept away. They have become squatters on other peoples' land and now experience severe poverty, malnutrition and health problems (Berrang-Ford, et al 2012; Harper 2012). They face high levels of discrimination in Ugandan society and are not treated or perceived as equal citizens (Kidd 2009). The list of violations they have experienced is long: forced labour, lack of political representation and participation, lack of access to education, housing, healthcare, social security and benefits, and more (Parliament of Uganda 2007; Mukasa 2014). At the local level, the Batwa are usually treated by neighbouring communities as inferior, and are consequently often exploited, excluded, and subjected to discriminatory and degrading treatment. Batwa women have experienced and continue to face a heightened vulnerability to sexual and gender-based violence (Jackson 2003).

In reaction to this situation the Batwa have organised themselves, notably through the establishment of a membership-based organisation, the United Organisations for Batwa Development in Uganda (UOBDU), which represents the Batwa communities of Kisoro, Kabale and Kanungu districts. The role of the organisation has been important to support the communities to demand compensation and remedies for their forced expulsion and loss of access to their ancestral forests. UOBDU notably supported the meetings with local councils, various government departments as well as the Parliament of Uganda. However, all these initiatives remained unheard, and worst of all, the Batwa's situation was aggravated when the authorities increased restrictions on access to forests, leading to a serious loss of access to important sources of livelihood following increased restrictions put by the authorities in the access to the forest. Consequently, faced with no other solution after all the political avenues were used, from local authorities to the national parliament, the Batwa took the decision to seek legal remedies. In 2013, several representatives of the Batwa communities submitted a petition to the constitutional court seeking remedies and compensation for loss of their land and for the recognition of their cultural rights. The petition seeks recognition of their status as indigenous peoples, redress for historic marginalisation and discrimination, and compensation for continuing human rights violations they are experiencing as a result of being dispossessed of their ancestral lands. Importantly, the Batwa petition asks the court to recognise that they have suffered serious discrimination regarding access to education, health, employment, economic development and participation in political life. They have also highlighted that they should be entitled to the affirmative action processes stipulated in Article 32(1) of the Ugandan constitution, highlighting that the absence of such affirmative action policies constitutes a failure on the part of government to protect and provide equally and equitably for all its citizens as guaranteed under Articles 30, 34, 40, 286 of the constitution. To support their arguments, and due to the lack of an effective legal framework to protect their rights, the Batwa have asked the court to recognise their rights as 'indigenous peoples'. This recognition is expressed in the petition as an essential element to support their cultural rights. The constitutional claims by the Batwa are unique as there

has been no previous legal challenge to the lack of constitutional protection of indigenous peoples' cultural rights. Also, the case is quite novel as it challenges the lack of proper positive interpretation of the 1995 constitution, which unlike the neighbouring CoK does not give space for the protection of marginalised hunter-gathering communities. In that sense, the legal challenge by the Batwa is trying to open a new space in the Ugandan legal system by introducing the notion of specific indigenous peoples' rights to culture.

The Batwa as indigenous peoples

One of the first challenges faced by the Batwa, like other indigenous communities in neighbouring Kenya, is their legal recognition as 'indigenous peoples'. The ACHPR in its report following a country visit had highlighted that in its view the Batwa are indigenous peoples according to international human rights law (ACHPR WGIP 2008). However, the definition of indigenous peoples in the Ugandan constitution does not have the same meaning as the definition of indigenous peoples in international law. In national law, the term 'indigenous' is used to identify people who are natives of Uganda and refers to an old definition set by colonial powers. The Constitution of the Republic of Uganda 1995 lists 'indigenous communities' in its Third Schedule, which includes the Batwa. However, this schedule is based on a colonial definition of 'tribe', and lists all 'tribes' existing or residing within the colonial borders of Uganda in February 1926. Hence the constitution adopts a very colonial tone by labelling all the country's ethnic groups as 'indigenous', following the colonial vision that all natives were indigenous, as opposed to white colonial settlers. As noted by Chris Kidd and Penninah Zaninka:

As a result, indigenous people in Uganda are both everyone – there are 56 different ethnic groups listed in the constitution as indigenous in 1926 – and no one in particular at the same time. (2008: 20)

In the petition, and in the anthropological experts' affidavits submitted to the court, it is argued that contemporary standards of definition of indigenous peoples should be used, and not colonial definitions. The petitioners notably rely on the approach adopted by the ACHPR towards indigenous peoples in Africa. The ACHPR uses the definition proposed by the Working Group of Experts on Indigenous Population/Communities (WGIP) which defines indigenous peoples based on the following characteristics: (a) their culture and way of life differ considerably from the dominant society, to the extent that their culture is under threat of extinction; (b) the survival of their particular way of life depends on access to lands and natural resources; (c) they suffer from discrimination as they are being regarded as less developed and less advanced than other more dominant sectors of society; (d) they often live in inaccessible regions and are often geographically isolated; (e) they are subject to domination and exploitation within national political and economic structures.³³

The ACHPR has further clarified that the term 'indigenous populations' does not mean 'first inhabitants' in reference to aboriginality, noting 'the question of aboriginality or of "who came first" is not a significant characteristic by which to identify indigenous peoples in itself' (ACHPR WGIP 2008: 10). Instead, the ACHPR notes:

Limiting the term 'indigenous peoples' to those local peoples still subject to the political domination of the descendants of colonial settlers makes it very difficult to meaningfully employ

the concept in Africa. Moreover, domination and colonisation have not exclusively been practised by white settlers and colonialists. In Africa, dominant groups have also repressed marginalized groups since independence, and it is this sort of present-day internal repression within African states that the contemporary African indigenous movement seeks to address. (ACHPR WGIP 2008: 10)

As the ACHPR concluded on the issue of definition:

When some particular marginalized groups use the term 'indigenous' to describe their situation, they are using the modern analytical form of the concept (which does not merely focus on aboriginality) in an attempt to draw attention to and alleviate the particular form of discrimination from which they suffer. (ACHPR WGIP 2008: 12)

It is within this context of claiming their rights under the contemporary human rights approach to indigenous peoples' rights that the claim of the Batwa may be placed. This case is an illustration of the importance for the concerned communities to be able to articulate their rights under the banner of indigenous peoples' rights. The lack of a proper legal framework to protect their rights has pushed them to take legal action against the government. The lack of any specific protection and recognition of their specific cultural rights has pushed them to rely on the international legal concept of indigenous peoples to get the constitutional court to acknowledge that they have fundamental cultural rights over their ancestral territories.

Land rights as cultural rights: proving cultural attachment

A key element of the Batwa petition before the constitutional court concerns their rights to land and natural resources. The Batwa have highlighted the central importance of their territories in terms of their cultural survival. There is an essential cultural connection between the Batwa and their ancestral territories; they constantly refer to the importance that their ancestral lands play within their culture. This includes economic aspects of culture (such as honey gathering), but also spiritual ties to forests. Access to their ancestral forests is considered not only in terms of material support for their livelihoods, but also culturally as important elements of their culture are based on collecting wild honey, wild yams, mushrooms and fruit, and worshipping their ancestors who are based in the forests from which they have been evicted. There is a significant spiritual and cultural attachment to these forests, demonstrated for example in the ways in which the Batwa refer to specific places where they worshipped their ancestors. Their forced removal over time, and the lack of access to their ancestral territories, means their culture has been put at risk by not allowing them access to their ancestral lands.

Another important cultural element of their ongoing attachment to ancestral territories manifests in the cultural importance attached to animals and plants found in forests, which constitute essential components of their culture. Historical records show that the Batwa have been hunters and gatherers for centuries (Kidd 2009). Important elements of their way of life are connected to hunting and gathering, activities which have been prohibited since their forced evictions from their ancestral territories. As evidence of such cultural attachment, the communities have developed a participatory 3D map of their ancestral territories as evidence of their cultural, spiritual and social attachment to their territories.

It represents important evidence for the concerned communities to 'prove' their cultural ties to their ancestral territories.

This point about evidence is important as legal processes (not only in Uganda) place an extremely arduous burden on communities to 'prove' they have a connection to their territory, in order to be able to claim any rights over it. The difficulty for many indigenous communities is that they do not hold any formal title to their lands; their rights are simply based on the fact that it has been their territory for centuries. However, across the globe courts and legal institutions usually rely on formal proof of ownership, which often favours formal legal owners to the detriment of marginalised indigenous peoples. In Africa, especially due to the colonial history of the continent, the formal legal owners of indigenous territories have often been declared as the states under the principle of 'eminent domain'.³⁴ This included forest areas occupied by the Batwa. In the face of these legal formalities, indigenous peoples have to prove that they exercise a cultural connection to the concerned territory to prove their rights to the land. It is within this context that cultural rights, as developed under international law, have become part of the approach to proving legal entitlement to land. In 'proving' their cultural and spiritual connection to their ancestral land, indigenous peoples can counteract the formalistic (and colonialist) language of modern-day governments. It is based on such approach that the Batwa have claimed their rights as indigenous peoples to the protection of their cultural rights, which include rights to land and natural resources. Referencing the norms concerning indigenous peoples' human rights developed under international law is one of the very few legal options left to the Batwa, in order to make this connection between land rights and cultural rights, since no such avenues exist in national law. From this perspective, the situation faced by the Batwa is quite similar to that faced by some of the very marginalised indigenous communities in Kenya who are facing a high burden to prove their cultural rights. From this perspective, an important element of the cases put forward by indigenous communities in both Kenya and Uganda relates to the push for courts to acknowledge they have a right to cultural integrity, based on international legal jurisprudence on the issue.

The recognition of a right to 'cultural integrity'

An important claim made by the Batwa is for the recognition of their right to 'cultural integrity'. This notion of 'cultural integrity' is increasingly used to support indigenous peoples' cultural rights under international law. It provides an answer to the complex and inadequate division of cultural rights protection under most legal systems. Usually a multitude of legal regimes exist to protect cultural rights, which notably include the protection of 'intangible', 'tangible' and 'natural' cultural heritage, but also the division between intellectual, immaterial and material protection of cultural heritage. For many indigenous peoples, the challenge has been to make their holistic approach to cultural rights fit within this fragmented legal regime governing cultural rights and cultural heritage. While the right to 'cultural integrity' does not appear in any of the international human rights treaties, it refers to a bundle of different human rights such as rights to culture, subsistence, livelihood, religion and heritage. The right to a 'collective right to cultural integrity' encompasses many different essential elements of indigenous peoples' cultural heritage. As such, it offers a promising way to adopt a much more holistic approach

to cultural rights by including cultural heritage, freedom of religion, the right to health, and the right to development under the same umbrella (EMRIP 2015).

Legally speaking, references to the need to respect the integrity of indigenous peoples are made in Article 8(2) of the UNDRIP that prohibits any action 'which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities'. Likewise, Article 2 of the ILO Convention 169 states: 'Governments shall have the responsibility for developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.' As noted in 2009 by the Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment on cultural rights:

The strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. (Para 36)

Likewise, in its General Comment 21, the CESCR highlighted that states' parties must:

respect the rights of indigenous peoples to their culture and heritage and to maintain and strengthen their spiritual relationship with their ancestral lands and other natural resources traditionally owned, occupied or used by them, and indispensable to their cultural life. (Para 49)

One of the clearest judicial expressions of the right to cultural integrity and its content comes from the 2010 decision of the ACHPR in the *Endorois* case against Kenya, mentioned earlier. In this case, the Endorois claimed that access to their ancestral territory 'in addition to securing subsistence and livelihood, is seen as sacred, being inextricably linked to the *cultural integrity* of the community and its traditional way of life'.³⁵ As highlighted in their pleadings, access to their traditional lands relates to 'health, livelihood, religion and culture', which 'are all intimately connected with their traditional land, as grazing lands, sacred religious sites and plants used for traditional medicine are all situated around the shores of Lake Bogoria'. They argued that by removing them from their land, and not allowing access to this important site, the government had violated their fundamental right to cultural integrity. There is no specific provision in the African Charter referring to a 'right to cultural integrity'. Instead, the Endorois claimed that their removal meant a violation of their right to practise their religion (Article 8), their right to culture (Article 17), and their right to access natural resources (Article 21). They nonetheless put forward the argument that all these rights were to be regarded as part of their right to cultural integrity.

This notion of cultural integrity refers to a more encompassing approach to the meaning of cultural rights when these are attached to a particular territory for indigenous peoples. It includes a more 'holistic' approach to cultural rights by encompassing traditional practices in a broad sense, including for example language, art, music, dance, song, but also sacred sites, traditional territories, the use of natural resources, including bio-cultural heritage and traditional food production systems such as rotational farming, shifting cultivation, pastoralism, artisanal fisheries and other forms of livelihood that require access to natural sources. Many indigenous peoples have thus highlighted how their cultural heritage needs to be apprehended in a holistic and inter-generational manner based on common material and spiritual values that are influenced by their

environment (Disko & Tugendhat 2014). The reference to a right to cultural integrity captures a holistic approach to cultural rights, rather than adopting a compartmentalising approach which dissects cultural rights according to different legal categories. In claiming their right to cultural rights using the indigenous peoples' rights umbrella, the Batwa have relied on this holistic approach to cultural integrity to secure the recognition of their holistic and intergenerational cultural connection to their ancestral territories. Such an approach might allow them to challenge the lack of proper legal protection of their rights under the constitutional framework of the country.

Conclusion

In both countries, the concerned communities have come to rely upon and use the international human rights concept of indigenous peoples due to the lack of a proper national legal recognition of their fundamental cultural rights over their land and natural resources. With the dominant legal and political system favouring the rights of the dominant ethnic groups, the legal framework developed under international law linking cultural rights and land rights for indigenous peoples has become a central vehicle to challenge the invisibility of indigenous communities. The notion and legal concept of indigenous peoples has greatly evolved over the last few decades, acquiring a contemporary interpretation which modifies the colonial view that all precolonial inhabitants of the continent are indigenous. The ACHPR has clarified that the term 'indigenous populations' does not mean 'first inhabitants', in reference to aboriginality. This legal evolution of the use of the term 'indigenous' is important for small marginalised communities such as the ones examined in this article. For the Batwa, the Ogiek, or the Endorois, their legal claims as indigenous peoples have allowed them to bring attention to their plight as small marginalised communities whose rights have been ignored for centuries.

An important aspect of this development relates to the recognition of the historical and cultural connection of indigenous communities to their ancestral lands, territories that are now often occupied by others. Based on this approach, indigenous communities are increasingly pursuing legal means to secure remedies for the violations of their cultural rights, notably highlighting their right to cultural integrity. Indigenous peoples have the right to cultural integrity, which is a very specific legal norm that has been developed under international law to protect highly marginalised and pressurised indigenous cultures. The 'right to cultural integrity' refers to a larger approach to culture which includes the economic, social and spiritual aspects of a culture. This broader approach to cultural rights integrates indigenous peoples' claims that cultural rights are part of their way of life, which includes access to land central to their specific culture.

The unique situation of indigenous communities in both Kenya and Uganda offers some potential avenues to support such developments. In Kenya, this is based on potential positive interpretation and future implementation of the CoK. In this case, the objective of litigation is to invite courts to push the authorities to act on their legal constitutional obligations. In Uganda, the engagement with the court is quite different as the aim is to get the court to challenge the lack of proper constitutional protection. Recognition by the national courts that these groups are indigenous peoples would be an important first step towards recognising them as historically discriminated societies entitled to specific rights, notably their cultural rights.

Finally, as a last word, this article does not argue that only litigation can provide such positive change; indeed, other political and advocacy platforms are essential. Rather, it argues that litigation can provide an important empowering tool for marginalised communities who often feel that the legal system is against them; this is especially the case with indigenous communities. Litigation is only one tool amongst many to challenge the lack of recognition of indigenous peoples' cultural land rights entitlements. In this context, it is important to bear in mind that litigation and winning in court is often only the start of a process rather than the end, since implementation of court decisions is often a fraught process. Arguably, what the experience of the Endorois, Ogiek, and Batwa shows is that litigation is not necessarily about getting remedies. It is also a way for marginalised communities to get some form of political and legal acknowledgment of their fundamental rights as citizens of the state, something which is often missing for communities who are totally marginalised from the dominant political, economic and cultural agenda of most African states.

Notes

1. Jérémie Gilbert conducted the research and writing for the section on Uganda, and Kanyinke Sena conducted the research and writing for the section on Kenya.
2. [2017] eKLR (*Ngumi*).
3. Merriam-Webster online dictionary <<https://www.merriam-webster.com/dictionary/culture>>.
4. Communication number 276/03 (the *Endorois* case) <<http://www.achpr.org/communications/decision/276.03/>> (accessed 7 March 2017).
5. *Endorois*, para 241.
6. See <http://en.unesco.org/creativity/sites/creativity/files/activities/conv2005_eu_docs_kenya_policy.pdf>.
7. Case no 91 of 1912 (EAP 1914), 5 EALR 70 (*Ole Njogo*).
8. 1984 KLT SN 17 (case no 29).
9. See *Ngumi* (note 2 above) para 35.
10. [2006] eKLR (*Lemeiguran*).
11. ELC Civil Suit No. 821 of 2012 (OS).
12. *Ibid* 13, para 7.
13. [2014] eKLR (*Ole Kaapei*).
14. There is some contention over the number of ethnic communities in Kenya. While the government maintains there are now 44 (42 until recently), others have placed the number between 70 and 90 ethnic communities.
15. As it was then called. The Electoral Commission was disbanded in 2008 and replaced by the Interim Electoral and Boundaries Commission of Kenya. The Independent Electoral and Boundaries Commission of Kenya was established after the new constitution was adopted in August 2010.
16. Under Article 89(2) of the CoK, the Independent Electoral and Boundaries Commission shall review the names and boundaries of constituencies at intervals of not less than eight years, and not more than 12 years, but any review shall be completed at least 12 months before a general election. The Electoral Commission of Kenya also had a similar mandate as the law stood at the time of the decision.
17. For example, Cherangany Forest was the ancestral home of the Sengwer, Amboseli National Park was the ancestral home of the Maasai, and Lake Bogoria was the ancestral home of the Endorois.
18. [2014] eKLR (*Joseph Letuya*).
19. 'Report of the Prime Minister's Taskforce on the Conservation of the Mau Forest Complex', Government of Kenya (2009).
20. *Joseph Letuya* (note 18 above).

21. The Interpretation Clause of the Community Land Act 2016 defines 'community' as a consciously distinct and organised group of users of community land who are citizens of Kenya and share any of the following attributes: common ancestry; similar culture or unique mode of livelihood; socioeconomic or other similar common interest; geographical space; ecological space; or ethnicity.
22. Concessions for geothermal power production and mining of ruby around the lake are being considered by the national and county governments. Investments in bioenzymes are also being negotiated through the Kenya Wildlife Service (KWS) with foreign investors.
23. MRG, the UK-based NGO that litigated the *Endorois* case, has interpreted this recommendation to mean all the material and immaterial losses suffered by the Endorois since the gazetting of the lake as a national reserve.
24. For more on the OPDP, see <<http://www.ogiekpeoples.org>>.
25. Application No 006/2012, *African Court on Human and Peoples' Rights v Republic of Kenya* <<http://en.african-court.org/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples'%20Rights%20v.%20the%20Republic%20of%20Kenya.pdf>> (*African Court*).
26. *Ibid*, para 190.
27. *Ibid*, para 185.
28. *Ibid*, para 186.
29. *Ibid*, para 187.
30. From testimonies of community activists.
31. The constitution had provided that a Community Land Act should be in place within five years from the promulgation of the CoK. However, the government failed to meet the constitutional deadline for unclear reasons. A Community Land Act was finally passed into law a year after the deadline.
32. The traditional territories of the Batwa cover several areas of the Bwindi Impenetrable National Park, Mgahinga Gorilla National Park and Echuya Central Forest Reserve.
33. Report of the African Commission WGIP/Communities submitted in accordance with the 'Resolution on the rights of indigenous peoples/communities in Africa' and adopted by the African Commission at its 28th ordinary session in November 2003 and published in 2005.
34. Eminent domain is the power of national government to take private property for public use, and under colonisation most of the forest lands were acquired by governments.
35. *Endorois* decision (note 4 above) para 16, emphasis added.

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